LEGAL AND POLICY ISSUES PERTAINING TO THE MANDATORY SEPARATION OF HIV-POSITIVE MILITARY PERSONNEL

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I. INTRODUCTION

This Article assesses legal and policy issues implicated by a law requiring the mandatory separation of HIV-positive military personnel in the United States. This paper argues that the law not only makes bad policy, but that it also constitutes a violation of the equal protection clause of the Constitution.

The Article will proceed in seven parts. Part II presents a brief history of the enactment of the law mandating separation of from military service. Part III provides an overview of military policy regarding HIV-positive personnel. Part IV presents the arguments in favor of mandatory separation, while Part V assess these justifications from both legal and policy grounds. Part VI analyzes the law particularly in the context of the equal protection clause of the Constitution. Finally, Part VII provides the conclusions drawn from the analysis of the law.

II. BACKGROUND OF THE LAW

The Dornan Amendment

On February 10, 1996, United States President William Clinton signed the National Defense Authorization Act for Fiscal Year 1996, a

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measure he earlier vetoed for several reasons. In his veto message last December, the President cited as his reasons, provisions "that would unfairly affect certain service members" such as the "medically unwarranted discharge procedures for HIV-positive service members."[1] The provision mandating the discharge, otherwise known as the Dornan Amendment (after its sponsor Robert K. Dornan of Orange County, California), would require the discharge of all HIV-positive personnel from military service within six months from the signing of the bill.[2] The

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[1]National Defense Authorization Act for Fiscal Year 1996-Veto Message from the President of the United States (H. Doc. No. 104-155), *reproduced in* 142 Cong. Rec. H12-02.

[2]101 Stat. 186, 328 (1996) reads:

> SEC. 567. DISCHARGE OF MEMBERS OF THE ARMED FORCES WHO HAVE THE HIV-1 VIRUS.
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> (a) IN GENERAL.--(1) Section 1177 of title 10, United States Code, is amended to read as follows:
>
> Sec. 567(a)
>
> "s 1177. Members infected with HIV-1 virus: mandatory discharge or retirement
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> "(a) MANDATORY SEPARATION.--A member of the armed forces who is HIV-positive shall be separated. Such separation shall be made on a date determined by the Secretary concerned, which shall be as soon as practicable after the date on which the determination is made that the member is HIV-positive and not later than the last day of the sixth month beginning after such date.
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> "(b) FORM OF SEPARATION.--If a member to be separated under this section is eligible to retire under any provision of law or to be transferred to the Fleet Reserve or Fleet Marine Corps Reserve, the member shall be so retired or so transferred. Otherwise, the member shall be discharged. The characterization of the service of the member shall be determined without regard to the determination that the member is HIV-positive.
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> "(c) DEFERRAL OF SEPARATION FOR MEMBERS IN 18-YEAR RETIREMENT SANCTUARY.--In the case of a member to be discharged under this section who on the date on which the member is to be discharged is within two years of qualifying for retirement under any provision of law, or of qualifying for transfer to the Fleet Reserve or Fleet Marine Corps Reserve under section 6330 of this title, the member may, as determined by the Secretary concerned, be retained on active duty until the member is qualified for retirement or transfer to the Fleet Reserve or Fleet Marine Corps Reserve, as the case may be, and then be so retired or

transferred, unless the member is sooner retired or discharged under any other provision of law.

"(d) SEPARATION TO BE CONSIDERED INVOLUNTARY.--A separation under this section shall be considered to be an involuntary separation for purposes of any other provision of law.

"(e) ENTITLEMENT TO HEALTH CARE.--A member separated under this section shall be entitled to medical and dental care under chapter 55 of this title to the same extent and under the same conditions as a person who is entitled to such care under section 1074(b) of this title.

"(f) COUNSELING ABOUT AVAILABLE MEDICAL CARE.--A member to be separated under this section shall be provided information, in writing, before such separation of the available medical care (through the Department of Veterans Affairs and otherwise) to treat the member's condition. Such information shall include identification of specific medical locations near the member's home of record or point of discharge at which the member may seek necessary medical care.

"(g) HIV-POSITIVE MEMBERS.--A member shall be considered to be HIV-positive for purposes of this section if there is serologic evidence that the member is infected with the virus known as Human Immunodeficiency Virus-1 (HIV-1), the virus most commonly associated with the acquired immune deficiency syndrome (AIDS) in the United States. Such serologic evidence shall be considered to exist if there is a reactive result given by an enzyme-linked immunosorbent assay (ELISA) serologic test that is confirmed by a reactive and diagnostic immunoelectrophoresis test (Western blot) on two separate samples. Any such serologic test must be one that is approved by the Food and Drug Administration.".

(2) The item relating to such section in the table of sections at the beginning of chapter 59 of such title is amended to read as follows:

"1177. Members infected with HIV-1 virus: mandatory discharge or retirement."

Sec. 567(b)

(b) EFFECTIVE DATE.--Section 1177 of title 10, United States Code, as amended by subsection (a), applies with respect to members of the Armed Forces determined to be HIV-positive before, on, or after the date of the enactment of this Act. In the case of a member of the Armed Forces determined to be HIV-positive before such date, the deadline for separation of the member under subsection (a) of such section, as so amended, shall

Dornan Amendment would lead to the discharge of over a thousand people currently serving in the military.[3]

The day before he signed the bill, the White House held a press briefing to explain the President's response to the Amendment. First, the President would support legislation that will repeal the Dornan Amendment. Second, because he found the Amendment unconstitutional, he directed the Attorney General not to defend it in the event that it is challenged in court.[4] Finally, the President would direct the Departments of Defense, Veterans' Affairs, and Transportation to ensure that the separated service members and their families will get the full measure of benefits that they should, including disability retirement pay, health coverage for their families, and transition benefits such as job training.[5] Since there is a six-month period before separation would be mandated, the President's aides said that no one would be separated "until the last possible moment."[6]

Clinton's Press Secretary pointed out that the bill would nevertheless be signed because most of the objectionable provisions found in the earlier version of the bill were addressed by Congress.[7] The

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be determined from the date of the enactment of this Act (rather than from the date of such determination).

[3]Press briefing by Counsel to Pres. Jack Quinn and Asst. Attorney General Walter Dellinger, February 12, 1996 M2PW (No Page), 1996 WL 7893248.

[4]The White House personnel explained that the Amendment is "operationally unnecessary, harsh, and would impose "a degree of pain and suffering on members of the military that is unwarranted." Defense Department Briefing, Federal Information Systems Corporation, February 1, 1996 (available from LEXIS-NEXIS, World Library, Allwld File).

[5]Assistant Attorney General Walter Dellinger explained that the President could not direct the Secretary of Defense to refrain from actually dismissing affected personnel because they did not have prior judicial determination that the provision is unconstitutional. Press briefing by Counsel to Pres. Jack Quinn and Asst. Attorney General Walter Dellinger, February 12, 1996 M2PW (No Page), 1996 WL 7893248.

[6]*Id.*

[7]According to Quinn:

> The President's veto message on December 28th was occasioned because of objections to numerous aspects of the bill, including the HIV provision. But most onerous in the President's view, and those cited in his veto message of December 28th, was the section

bill contained favorable provisions such as increases in full military pay and allowances, the troop housing improvement initiative which was vigorously sought by the Department of Defense, and the improvements on acquisition and procurement reform.[8] Although Congress did not repeal the Amendment as the President wished, the bill itself was deemed critical to national defense.[9] The provision on the mandatory separation of military personnel was also substantially modified and so the President could not justify a second veto.[10]

Members of Congress agreed with the President's assessment of the Dornan Amendment. Representative Barney Frank of Massachusetts called the provision "cruel and wholly unjustified" and urged his colleagues, to redeem themselves by "repealing this provision before it goes into effect."[11] In the Senate, Senator Barbara Boxer called the provision "shameful" and said that it lacked support from the military. She also said that the Amendment would end the United States' tradition of standing by its soldiers.[12]

In response to these criticisms, the U.S. Senate, on March 19, 1996, repealed the Dornan Amendment,[13] but a repeal is expected to "encounter much stiffer opposition" in the House of Representatives. Dornan's chief of staff said that the House of Representatives would stop

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> that would have mandated 50-state deployment of a missile defense system by the year 2003, and the section that would have curbed some of his constitutional responsibilities as Commander-in Chief, especially as it related to United States forces attached to United Nations. And then, third, the section that would have mandated supplemental budget requests to fund overseas military contingency operations, which we wanted to have as a nonbinding sense of Congress language.

Press briefing by Mike McCurry, February 12,1996 M2 Presswire (Pg. Unavail. Online), 1996 WL 7893255.

[8]*Id.*

[9]*Id.*

[10]*Id.*

[11]142 Cong.Rec. E233-03, 1996 WL 84053 (Cong.Rec.).

[12]142 Cong.Rec. S865-01, 1996 WL 39761 (Cong.Rec.).

[13]The repeal was approved without debate and by voice vote. Janet Hook, *Senate Rejects Law to Oust HIV Carriers From Military*, L.A. Times, March 20, 1996, at A1.

the repeal efforts "dead in its tracks."[14] Dornan agreed to a proposed 4-month delay in the implementation of the separation to allow time for Senators "to get educated on this pandemic."[15]

Congressional negotiators, anxious to close a budget deal with the White House, agreed to repeal the Dornan Amendment. But on April 25, the personnel subcommittee of the House National Security Committee approved a similar measure on the same day that Congress was voting to repeal the Amendment.[16] Another measure that was approved would allow inquiry into the sexual orientation of incoming military personnel.[17] Dornan introduced both measures, and on May 1, the National Security Committee agreed to both.[18]

III. MILITARY POLICY ON DISCHARGES

In the aftermath of the passage of the Dornan Amendment, House Speaker Newt Gingrich dismissed pleas for its repeal, specifically one

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[14]*Senate Moves to Repeal Military HIV Ban*, March 20, 1996 APN-HE; 4 American Political Network, American Health Line, Volume 4, No. 237, March 20, 1996. Dornan vowed to preserve the discharge of military personnel who test positive for the AIDS virus, and expressed confidence that the House leadership will support him. He said that a conversation with House Speaker Newt Gingrich convinced him there is "zero chance" the House leadership will allow the Senate to kill the measure, and he predicted the proposed repeal will die in a House-Senate conference committee this week. Joyce Price, *Dornan says leaders back him on HIV*, Wash. Times (D.C.) A12, 1996 WL 2949864, March 21, 1996.

[15]*Dornan Makes Modification in HIV Law*, March 30,1996 L.A. Times 31, 1996 WL 5255543. He also branded the Senate's repeal of the amendment "a cowardly act" that was "obvious kowtowing to the activist homosexual agenda." Joyce Price & Rowan Scarborough, *Hill negotiators put off decision on discharging soldiers with HIV*, March 30,1996, 1996 WL 2950698.

[16]*HOUSE IN TUG OF WAR OVER HIV IN MILITARY*, April 26,1996 Rec. N. N.J. A21, 1996 WL 6086568. This time, however, the measure would allow military service chiefs to retain HIV-positive service members, "if the service secretary deems their retention as necessary." *MILITARY HIV LAW OK'D, REPEALED IN SAME DAY*, April 26,1996 New Orleans Times-Picayune A5, 1996 WL 6416888.

[17]Gebe Martinez, *Rep. Dornan Revives HIV Mandatory Discharge*, April 26,1996 L.A. Times. 1, 1996 WL 5263804.

[18]Dina Elboghdady, *Committee OKs four proposals by Dornan*, May 2,1996 Orange County (Cal.) Reg. A09, 1996 WL 7025407.

from Earvin Johnson who just recently returned to play professional basketball despite being HIV-positive.[19] Gingrich said that combat situations are inherently different from basketball games, in that there was "a very real danger of transferring of fluids, transferring of blood" in combat.[20] In saying so, the Speaker demonstrated his lack of familiarity with present military policy regarding HIV-positive personnel.

The military already has policies regarding the discharge of HIV-positive personnel. In March 1985, the Department of Defense (DOD) mandated antibody testing with recently issued blood test kits and provided for communication of positive test results to the military medical service responsible for the donor's evaluation.[21] By August of that year, the DOD required testing of all potential recruits to protect the health of all personnel, and the blood supply during conflicts.[22] In October of the same year, the Secretary of Defense required the screening of active duty and reserve personnel, and barred the use of positive test results for punitive actions against individuals. He also indicated that members with a progressive disease could be evaluated for continued service.[23] Effective June 16, 1986, HIV seropositive individuals were not reassigned or deployed overseas. Those who were

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[19]Johnson announced his retirement from the Los Angeles Lakers on Nov. 7, 1991, after he tested positive for HIV. He returned the following exhibition season, but with limited education about HIV in the NBA and the minuscule risk of transmission on a basketball court still not fully understood, Johnson again retired during the exhibition season amid concerns of other players. Johnson returned for the 1992 All-Star Game in Orlando, and was also was a member of the 1992 Dream Team at the Barcelona Olympics. Ira Winderman, *Kindred Spirits Take Sides*, March 27, 1996 Sun-Sentinel (Ft. Lauderdale Fla.) 1C, 1996 WL 2494751.

[20]Kathey Alexander, Gingrich rejects Johnson AIDS policy plea, February 15, 1996 Atlanta J. & Const. A;12, 1996 WL 8180379.

[21]John A. Anderson, et al., *AIDS Issues in the Military*, 32 A.F. L. REV. 353, 358 (1990), *citing* Letter from Department of the Army DASG-MEDB, Military Implementation of Public Health Service Provisional Recommendations Concerning Testing Blood and Plasma for Antibodies to HTLV-III, (March 13, 1985).

[22]*Id.*, *citing* Message from HQ USAF/POM, 301859z, HTLV-III Screening (August 1985).

[23]*Id.*, *citing* Secretary of Defense Memorandum, Policy on Identification Surveillance, and Disposition of Military Personnel Infected with Human T-Lymphotropic Virus Type III (HTLV-III) (October 24, 1985).

overseas were reassigned to the United States.[24] Federal legislation later prevented the military from taking adverse actions against HIV-positive members such as involuntary separation for other than medical reasons.[25]

All active duty, reserve, and National Guard service members are routinely tested at least biennially[26] and other health care beneficiaries—such as spouses and children—are routinely screened in conjunction with some health care procedures such as yearly physical examinations.[27] Service members who test HIV-positive are not automatically discharged or separated; they are evaluated for retention and retained if they meet existing medical standards. If retained, the infected service member is given medical care and extensive medical counseling, assigned to duties consistent with his or her medical condition, and receives a medical separation only when he or she is no longer healthy enough to serve. Those who are separated remain eligible for continuing medical treatment through the Department of Veteran's Affairs.[28]

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[24]*Id.*, *citing* Message from HQ USAF/DPX: HTLV-III Reassignment/ Deployment Policy.

[25]National Defense Authorization Act for Fiscal Year 1987, Pub. L. No. 99-661, § 705(c), 100 Stat. 3816 (1986). The Secretary of Defense incorporated these limitations and disallowed reassignment, disqualification from Personnel Reliability Program duties, denial, suspension or revocation of a security clearance, suspension or termination of access to classified information, and removal from flight status or other duties requiring a high degree of stability or alertness. *See* Secretary of Defense Memorandum, Policy on Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (20 Apr. 1987), *cited in* Anderson, *supra* note 21, at 360.

[26]Elizabeth Beard McLaughlin, *A "Society Apart?": The Military's Response to the Threat of AIDS*, 1993-OCT Army Law. 3., at 4, *citing* Dep't of Army, Reg. 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV), para. 2-2a (March 11, 1988) (IC, 2824Z Mar. 1989) (I01, May 22 1989).

[27]*Id.*, *citing* Memorandum, Subject: Secretary of Defense Policy on Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (April 20 1987).

[28]Dep't of Army, Reg. 600-110, Identification, Surveillance, and Administration of Personnel Infected with Human Immunodeficiency Virus (HIV), para. 2-2j (11 March. 1988) (IC, 2824Z Mar. 1989) (I01, May 22, 1989).

Applicants to the military and active duty members are tested because these individuals are subjected to extensive immunizations and unusual threats of disease. In some situations, it is reasoned, there may be a need to rely on buddy blood donors without the laboratory capacities for testing each unit of blood for the presence of the HIV antibody.[29]

Information about HIV antibody positivity may result in changes of assignment, but positivity alone or with information obtained solely from a medical interview about illegal drug use of homosexuality cannot result in discharge.[30]

> Active duty personnel with serological evidence of HIV infection are refereed for a medical evaluation for documentation of fitness for continued service in the same manner as personnel with other progressive illnesses. Evaluation is conducted in accordance with a standardized clinical protocol. Evaluation is conducted in accordance with evidence of HIV infection who show no evidence of clinical illness or other indication of immunologic or neurologic impairment related to HIV infection are not separated solely on the basis of the serologic evidence of HIV infection. [31]

Military personnel who are infected with HIV and who are determined to be unfit for further duty are given a medical retirement or are medically separated.[32]

At present, the DOD adheres to the following policies:

> (a) Deny eligibility for appointment or enlistment for Military Service to individuals with serologic evidence of HIV-1 infection.
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> (b) Screen active duty (AD) and Reserve component military personnel periodically for serologic evidence of HIV-1 infection.
> (c) Refer AD personnel with serologic evidence of HIV-1 infection for a medical evaluation of fitness for continued service in the same

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[29]DOD Policy on AIDS, H.A.S.C. No. 100-51, Hearing before the Military Personnel and Compensation Subcommittee of the Committee on Armed Services House of Representatives (100th Cong., 1st Sess.) September 16, 1987., at 6.

[30]*Id.* at 7.

[31]*Id.* at 14.

[32]*Id.*

(c) Refer AD personnel with serologic evidence of HIV-1 infection for a medical evaluation of fitness for continued service in the same manner as personnel with other progressive illnesses, as specified in DOD Directive 1332.18. Medical evaluation shall be conducted in accordance with the standard clinical protocol, as described in the Standard Clinical Protocol. Individuals with serologic evidence of HIV-1 infection who are fit for duty shall not be retired or separated solely on the basis of serologic evidence of HIV-1 infection. AD personnel with serological evidence of HIV-1 infection or who are ELISA repeatedly reactive, but WB negative or indeterminate, shall be advised to refrain from donating blood.

(d) Deny eligibility for extended AD (duty for a period of more than 30 days) to those Reserve component members with serologic evidence of HIV-1 infection (except under conditions of mobilization and on the decision of the Secretary of the Military Department concerned). Reserve component members who are not on extended AD or who are not on extended full-time National Guard duty, and who show serologic evidence of HIV-1 infection, shall be transferred involuntarily to the Standby Reserve only if they cannot be utilized in the Selected Reserve.

(e) Retire or separate AD or Reserve Service members infected with HIV-1 who are determined to be unfit for further duty, as implemented in DOD Directive 1332.18.

(f) Ensure the safety of the blood supply through policies of the Head of the Armed Services Blood Program Office, the FDA guidelines, and the accreditation requirements of the Head of the American Association of Blood Banks.

(g) Comply with applicable statutory limitations on the use of the information obtained from a Service member during, or as a result of, an epidemiologic assessment interview and the results obtained from laboratory tests for HIV-1, as provided in this part.

(h) Control transmission of HIV-1 through an aggressive disease surveillance and health education program.

(i) Provide education and voluntary HIV-1 serologic screening for DoD healthcare beneficiaries (other than Service members).

(j) Comply with host-nation requirements for HIV-1 screening of DoD civilian employees, as described in appendix B to this part."[33]

IV. THE RATIONALE OF THE AMENDMENT

An examination of the rationale behind the Dornan Amendment is difficult considering that the Amendment has no legislative history. It was passed without the benefit of a single Congressional hearing or debate.[34] The proponent of the Amendment, however, has repeatedly expressed his views in other fora. Robert Dornan raised both policy and legal issues in his attempt to justify the mandatory separation of HIV-positive military personnel.[35]

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[33]Human Immunodeficiency Virus (HIV-1), 56 Fed. Reg. 15281; 32 CFR Part 58 [DoD Directive 6485.1] ,April 16, 1991.

[34]The measure was never subjected to a vote either in the House of Representatives or the Senate. Dornan inserted it into the House defense bill in committee and it glided through as part of the overall defense budget. *Lawmakers agree to rescind HIV, military statute*, April 25, 1996 Austin Am.-Statesman A2, 1996 WL 3426736.

[35]It is possible that Dornan's motives are driven purely by his stand against homosexual lifestyles. *See* John V. Garaffa, *AIDS: The Arbitrator's Role in the Post-Panic Period*, 7 OHIO ST. J. ON DISP. RESOL. 217, n.15 (1992) (Dornan is convinced the majority of AIDS infected people have only themselves to blame for their illness and that these "homosexuals" have shown their inherent immorality by joining the pro-abortion movement to secure fetal tissue for AIDS research), *citing* 135 Cong. Rec. H2029-01 (daily ed. May 3, 1990) (statement by Rep. Dornan). He would go so far as to blame all of society's problems on bisexuals, lesbians, and gays. *See* Mark Strasser, *Domestic Relations Jurisprudence and the Great Slumbering Baehr: On Definitional Preclusion, Equal Protection, and Fundamental Interests*, 64 FORDHAM L. REV. 921, 986 (1995). Dornan claims that "one of the root causes [of all social ills is] trying to sell sodomy as a healthy lifestyle." *citing* 140 Cong. Rec. H2026 (daily ed. Mar. 24, 1994) (statement of Rep. Dornan). Dornan has been careful not to use his position on homosexuality in his defense of the mandatory separation. It should be pointed out, however, that this approach—omitting any reference to anti-homosexual motives in legislation—has been used before. In Able v. United States, 880 F.Supp. 968 (D.N.Y. March 30, 1995), the District Court found unconstitutional § 571 of the National Defense Authorization Act for the Fiscal Year 1994 (10 U.S.C. § 654) concerning a new policy as to homosexuals. According to the Court, "the Act was designed to say nothing about heterosexual animosity towards homosexuals" to escape possible constitutional scrutiny. *Id.* at 976-977.

1. Dornan believes that HIV-infected personnel should not be allowed to stay in the military because their inability to donate blood indicates that they are not healthy. He has been quoted as saying that, "By definition we in this Congress added them to the American with Disabilities Act. Every HIV person in this country is considered disabled, so they are not healthy."[36] He contends that because the Americans with Disabilities Act (ADA)[37] covers cases involving HIV infections, these people are necessarily unhealthy.

2. Dornan also justifies the separation by saying that, HIV-positive personnel violated the law. He claims that almost all cases of HIV infection in the military are the result of illicit drug use, homosexual conduct, and sex with prostitutes. When discussing HIV-positive military personnel, Dornan has been quoted as saying that, "[b]y sticking a dirty needle in his arm, he has broken the law."[38]

3. Additionally, he claims that the discharge of personnel would save the military $3.5 million a year in hospital costs.[39]

4. The crux of Dornan's argument, however, has to do with military readiness. He claims that HIV-positive personnel were only reluctantly retained by the military to avoid a public relations battle. But the recent downsizing of the military, he claims, presents new problems because HIV-positive personnel are not deployable, and their presence "means either immediately deploying another soldier or sailor as a replacement, or ending the career of a fully deployable service-infected person."[40] In an earlier statement, Dornan explained the necessity of the provision as follows:

> In a time of increased defense downsizing, we cannot afford to keep on active duty personnel who are not fully deployable worldwide. We must also be fair to those who are fully deployable. They should not have to spend additional time away from friends and

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[36]142 Cong. Rec. H1207-02, at H1214.

[37]42 U.S.C.A. § 12101, *et seq.*

[38]Faye Fiore, *Battle Forms Over Military Discharge Provision*, June 7, 1994 L.A. Times 3, 1994 WL 2173537.

[39]*Id.*

[40]Robert K. Dornan, *Think of Magic Just Playing at Home*, L.A. Times, March 19, 1996, at B7.

> family because they have to remain overseas in place of someone who is not deployable.[41]

He downplayed the return of Earvin Johnson to the National Basketball Association because "NBA team owners love money more than people (owners led a massive public relations campaign among players to get them to support their wishes) and because NBA peer pressure outweighs common sense. The life-and-death military does not have that luxury."[42]

5. Although HIV-personnel are not the only ones that are non-deployable, they are, Dornan claims, the only ones with illnesses that are irreversible and incurable.[43] He also contends that, in the last two years, the military has discharged more than 12,000 men and women for being overweight, or for being too skinny, too weak, and other health problems acquired after enlistment and for other reasons such as alcohol abuse, and that HIV infection is an exception to this rule.[44]

6. He also asserts that "Courts have held that the military is not responsible for disabilities unrelated to military service," and yet his amendment "graciously gives HIV-infected personnel honorable discharges and full health benefits for the rest of their lives, even though the three primary ways of transmission in the military, representing

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[41]142 Cong. Rec. H1207-02, H1214. Dornan appended letters from officials in the Department of the Navy, the Chief of Naval Operations, the Non-Commissioned Officers Association which support the mandatory separation of HIV personnel. *Id.* at H1214-1215. Other supporters of the amendment claim that the military's overriding mission is to have every member ready to deploy overseas, and the Pentagon should not exempt any one group. Rowan Scarborough, *HIV-positive troops lose special treatment*, March 5,1996 Wash. Times (D.C.) A3, 1996 WL 2948422. Dornan has been quoted as saying that "[i]f today's soldiers cannot (be deployed for combat), they have no business in our armed forces." Gebe Martinez, *Clinton to Fight Discharge Rule; HIV-Positive Personnel to be Dismissed Under Bill*, February 10, 1996 Buff. News A1, 1996 WL 5822946.

[42]Dornan, *supra* note 40. He explains that, unlike Johnson, HIV-infected military personnel are ill by definition, even if they can still function. "Even without the Dornan provision, if Johnson was in the service, he would be allowed to play only home games. Under this restriction, the NBA might not have been as enthusiastic about his return."

[43]*Id.*

[44]*Id.*

99% of cases—illicit drug use, visits with a prostitute and homosexual activity—are violations of the Uniform Code of Military Justice."[45]

V. ASSESSING THE ARGUMENTS

Dornan advances several reasons that ostensibly justify the mandatory separation of military personnel who test positive for HIV. These policy and legal grounds, as discussed below, however, are based on precarious reasoning. Indeed, an analysis of the arguments would show that the Dornan Amendment makes little sense. We consider his arguments separately:

1. Dornan argues that HIV-positive military personnel are not healthy by definition, and may, therefore, be separated from the service. This argument is erroneous. The fact that the ADA covers certain disabilities is not a conclusion that a person can be separated from employment. The ADA classifies neither HIV, nor any other disease or condition, as a *per se* disability. Instead, application of the statute to a given individual depends on whether that individual has a physical or mental impairment, and whether that impairment substantially limits a major life activity of that individual.[46] The ADA proscribes discrimination against individuals with disabilities when they are "otherwise qualified" to perform their jobs.[47] In other words, Dornan,

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[45]*Id.*

[46]Abbott v. Bragdon, 912 F.Supp. 580, 585 (D.Me., Dec. 22, 1995) (No. Civ. 94-0273-B).

[47]Indeed, the purposes of the ADA are:

> (1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities;
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> (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities;
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> (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and
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> (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

distorts the Congressional intent under the ADA by suggesting that inability to donate blood is a ground for exclusion from the military.

Besides, courts have held that the ADA does not apply to the military,[48] and it makes little sense for the proponents of mandatory discharge to cite this law to support its position.

2. Dornan has also suggested that since the incidence of HIV-infection in the military is frequently brought about by illicit drug use, association with prostitutes, or engaging in homosexual conduct, then there has been a violation of the Code of Military Justice, which sanctions the separation. The obvious flaw in this argument is that it presumes guilt without the benefit of any form of hearing, judicial or administrative. In effect, Dornan would use the seropositive status of a person as an indication of unlawful behavior, which is frowned upon by courts.[49] If Dornan believes that there has been a violation of the Code, then he should resort to the administrative procedures within the military that allow the determination of guilt and the subsequent discharge of the personnel involved. His argument brushes aside the most basic notions of due process.

It might even be argued that the Dornan Amendment is a bill of attainder, which is proscribed by the Constitution.[50] This provision could be constitutionally infirm because it "legislatively determines guilt and inflicts punishment upon an identifiable individual without

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42 U.S.C.A. § 12101 (b). *See also* Galloway v. Superior Court of District of Columbia, 816 F.Supp. 12 (D.D.C., Mar. 16, 1993) (No. Civ. A. 91-0644 (JHG)) (the ADA was enacted to prevent old-fashioned and unfounded prejudices against disabled persons from interfering with those individuals' rights to enjoy the same privileges and duties afforded to all United States citizens).

[48]*See* discussion, *infra*, Part V.

[49]*See* U.S. v. Brigoni-Ponce, 422 U.S. 873, 885-887 (1975), Robinson v. California, 370 U.S. 660, 665-667 (1962), Powell v. Texas, 392 U.S. 514, 532-534 (1968).

[50]U.S. Const., Art. I, § 9, cl. 3. Technically, an act is a "bill of attainder" when the punishment is death and it is a "bill of pains and penalties" when the punishment is less severe. Both, however, fall within the scope of the constitutional prohibition. BLACK'S LAW DICTIONARY 165 (6th ed. 1990).

provision of the protections of a judicial trial."[51] The Constitution prohibits legislatures from singling out disfavored persons and meting out summary punishment for past conduct.[52] "The singling out of an individual for legislatively prescribed punishment constitutes an attainder whether the individual is called by name or described in terms of conduct which, because it is past conduct, operates only as a designation of particular persons."[53] There is uneasiness with bills of attainder because the Legislature's powers are so broad that it can withdraw settled expectations suddenly, without individualized consideration, and because political pressures may compel the legislature to use retroactive legislation as a means of retribution against unpopular groups or individuals.[54] Indeed, the Supreme Court has held that legislative measures precluding certain persons from engaging in certain professions violates the Constitution.[55]

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[51]Nixon v. Administrator of General Services, 433 U.S. 425, 468, 97 S.Ct. 2777, 2803 (1977).

[52]*See* United States v. Brown, 381 U.S. 437, 456-462 (1965).

[53]Communist Party of the United States v. Subversive Activities Control Board, 367 U.S. 1, 86, 81 S.Ct. 1357, 1405 (1961) (when past activity serves as "a point of reference for the ascertainment of particular persons ineluctably designated by the legislature" for punishment, the Act may be an attainder. *Id.*, at 87, 81 S.Ct., at 1405.

[54]Landgraf v. USI Film Products, 114 S.Ct. 1483, 1497 (1994). The Supreme Court explained that, "Legislatures are primarily policymaking bodies that promulgate rules to govern future conduct. The constitutional prohibitions against the enactment of ex post facto laws and bills of attainder reflect a valid concern about the use of the political process to punish or characterize past conduct of private citizens. It is the judicial system, rather than the legislative process, that is best equipped to identify past wrongdoers and to fashion remedies that will create the conditions that presumably would have existed had no wrong been committed"). *See* Richmond v. J. A. Croson Co., 488 U.S. 469, 513-514, 109 S.Ct. 706, 732 (1989), Stevens, J., concurring in part and concurring in judgment); *See also* James v. United States, 366 U.S. 213, 247, n. 3 (1961) (retroactive punitive measures may reflect "a purpose not to prevent dangerous conduct generally but to impose by legislation a penalty against specific persons or classes of persons").

[55]The Supreme Court in Cummings v. Missouri, 4 Wall. 277, 324, 18 L.Ed. 356 (1867) struck down a provision of the Missouri post-Civil War Reconstruction Constitution that barred persons from various professions unless they stated under oath that they had not given aid or comfort to persons engaged in armed hostility to the United States and had never "been a member of, or connected with, any order, society, or organization, inimical to the government of the United States." *Id.*, at 279. The Court said that the oath was required, not to ascertain whether parties were

The other problem with Dornan's argument is that it would allow the discharge of military personnel who did not violate the Code. Yet, the Amendment makes no attempt to distinguish them, and instead forces all HIV-positive personnel off the military.

3. The third argument pertains to the reduction of costs. Although it might be possible to make an argument that the reduction of costs can justify disparate treatment under a legislative classification,[56] there have been instances when courts found such reasoning inadequate.[57] Besides, even if it is true that billions of dollars can be saved by the mandatory separation, it would not explain why only HIV-positive personnel have been targeted for separation. Presumably, medical care for other non-deployable military personnel incur costs, especially in light of the fact that the HIV-positive personnel constitute only a small percentage of all non-deployable personnel. If Dornan is truly concerned with the reduction of costs, then there are many other ways in which

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qualified" for their professions, but rather to effect a punishment for having associated with the Confederacy. The Court also struck down a similar oath that was required for admission to practice law in the federal courts in *Ex parte Garland*, 4 Wall. 333, 18 L.Ed. 366 (1867) because the oath "operate[d] as a legislative decree of perpetual exclusion" from the practice of law, since past affiliation with the Confederacy prevented attorneys from taking the oath without perjuring themselves.

[56]Maher v. Roe, 434 U.S. 464 (1977) (State's decision to implement its value judgment through the allocation of public funds does not contravene the Equal Protection Clause), Matthews v. Diaz, 426 U.S. 67 (1976) (classification of non-citizens to determine welfare benefits is justified by economic circumstances), Gedulgid v. Aiello, 417 U.S. 484 (1974) (California's disability insurance program which exempted from coverage any work loss resulting from pregnancy held valid because the State has a legitimate interest in maintaining the self-supporting nature of its insurance program and in distributing the available resources in a way that will keep benefit payments at an adequate level), and California Association of the Physically Handicapped v. Federal Communications Commission, 721 F.2d 667 (1983) (holding that FCC's failure to set up equal employment opportunity rules that give preferences to handicapped individuals in the ownership and management of broadcast facilities was justified because it required more resources and expertise than was required for similar programs to prevent employment discrimination against women and minorities).

[57]Carter v. Firemen's Pension, 634 P.2d 410 (1981) (administrative convenience alone cannot provide a rational basis for a statute which deprives a common-law spouse of pension benefits.).

this can be achieved without expressly targeting those infected with HIV.

The treatment of other disabilities can even be considerably higher. The cost of treating cancer may be equal to or more expensive than that of AIDS.[58] The average cost of treating cancer is estimated to be between $30,000 to $100,000. While that of AIDS ranges from $50,000 to $70,000.[59] The Department of Health and Human Service Agency for Health Care Policy and Research estimates the cost of treating a person with AIDS at about $32,000 per year, with a lifetime cost averaging $85,333. On the other hand the average treatment cost of kidney disease involving dialysis is $185,000.[60] The per person cost of AIDS and HIV infection is comparable to the cost of treating other serious illnesses; the estimated annual cost of treating a person with full blown AIDS is $34,500, the annual cost of treating a person with renal disease is $35,000 and for serious cancers, $30,000. Even if the lifetime costs of treating AIDS is estimated at $120,000, it is still less than the cost of treating end-stage renal disease which has been estimated to be at $175,000.[61]

These figures cast doubt on Dornan's concern about the reduction of costs within the military. Even the costs of treating cancer are higher, and it must be stressed that the HIV-positive population within the military comprises a mere twenty percent of the non-deployable personnel. The health care costs of the 6,000 non-deployable personnel are again a small fraction of the health care costs of the other million odd members of the military. Indeed, it would also not be unreasonable to assume that those who are actually deployed overseas, and those

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[58]*See* Steven N. Hargrove, *Domestic Partnerships Benefits: Redefining Family in the Work Place*, 6 LOY. CONSUMER L. REP. 49, 54 (1994).

[59]J. Robert Cowan, *The New Family Plan: Employee Benefits and the Non-Traditional Spouse*, 32 U. LOUISVILLE J. FAM. L. 617, 633 n. 70 (1993-94). *See also* James R. Bruner, Note, *AIDS and ERISA Preemption: The Double Threat*, 41 DUKE L. J. 1115, 1156 (1992) (the lifetime estimated costs for AIDS is $50,000-$100,000, and $47,542 for cancer of the digestive system).

[60]Bryan Ford, *The Uncertain Case for Market Pricing of Health Insurance*, 74 B.U. L. REV. 109, 143 (1994).

[61]Steven Eisenstat, *Capping Health Insurance Benefits for AIDS: An Analysis of Disability-Based Distinctions Under the Americans with Disabilities Act*, 10 J.L. & POL. 1, 41-42 (1993).

deployed in combat situations incur higher health care costs due to their increased exposure to greater risks.

4. Dornan and his supporters also assert that the amendment is essential because non-deployable personnel degrade the readiness of military forces. Dornan's argument for "military preparedness," however, is flawed because it assumes that all members of the military must be deployable in the battlefield in an instant. This misconceives the nature of military operations. Dornan would have others believe that being in the service simply means picking up a firearm and going to the front lines. But military preparedness implicates technical and logistical support especially in this age where technology plays a major part in military operations. Thus, even if HIV-positive personnel are non-deployable, they can still function within the military, especially with the training that they have received.[62]

It should be stressed that the military does not retain all HIV-positive personnel. An HIV-positive service member can still be separated from the service if the periodic health evaluations show that he or she can no longer perform his or her duties. In other words, the military retains those who do not impair military readiness.

Dornan pointed out that separation from the military based on health issues is customarily done. While this may be true, it would note explain why the Amendment only targets HIV-positive personnel. For this argument to succeed, Dornan would have to include all non-deployable personnel under the mandatory separation rule. There are

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[62]Senator Barbara Boxer articulates the preposterous nature of Dornan's argument:

> Can anyone seriously contend that 1,059 HIV-positive soldiers—less than 0.1 percent of the total force—can meaningfully affect readiness? The Pentagon doesn't think so. Its top personnel policy expert, Assistant Defense Secretary Fred Pang, recently wrote that "as long as these members can perform their required duties, we see no prudent reason to separate and replace them ... The proposed provision would not improve military readiness or the personnel policies of the department."

Barbara Boxer, *Congress' military HIV policy shows it's missing the Magic*, February 12, 1996 Austin Am.-Statesman A7, 1996 WL 3418054.

about 6,500 men and women in the military who are non-deployable,[63] but the amendment affects only a small fraction of this group. Military personnel are placed on non-deployable status because they have severe asthma, or diabetes, or cancer, are ignored.

The related argument that Dornan has made is that non-deployability would be unfair to those who are fully deployable, because they would have "to spend additional time away from friends and family because they have to remain overseas in place of someone who is not deployable." This contention fails to consider the very small number of HIV-positive personnel in the military, and the small fraction of non-deployable personnel who are HIV positive.[64] A thousand or so men or women cannot be significant in this regard, and it is inconceivable that their non-deployable status can actually cause such a traumatic impact on the million or so other deployable individuals.

5. Dornan also attempts to distinguish HIV from other diseases that render other personnel non-deployable, by suggesting that, unlike asthma, diabetes, or cancer, HIV is incurable. Thus, he asserts that the mere fact that a disease is incurable is sufficient to warrant the mandatory separation of military personnel. This is simply incorrect. Asthma is incurable and can lead to death.[65] Diabetes is incurable.[66]

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[63]Military Discharges Over HIV "Unfair", March 6, 1996 Charleston Gazette & Daily Mail, 1996 WL 5177731.

[64]The fact is that their numbers are tiny and the persons who are nondeployable for other reasons greatly outnumber those who are HIV positive. *See* 142 Cong. Rec. S2285-02, *S2294. Senator Nunn points out that there are some 1.4 million members of the Armed Forces on active duty, only 1,150 are HIV positive, which amounts to less than one-tenth of 1 percent of the entire force. HIV-positive service members also make up only one-fifth of the 5,000 personnel in the military who are permanently non-deployable for medical reasons. "If we can usefully accommodate some 4,000 individuals who are non-deployable for reasons other than HIV, there is no reason why we should discharge the small additional fraction who are HIV positive." 142 Cong. Rec. S2285-02, *S2293.

[65]DAVID A. MORTON III, M.D., MEDICAL PROOF OF SOCIAL SECURITY DISABILITY § 3.5 (1996) (available from WESTLAW).

[66]Brian D. Shannon, *The Brain Gets Sick, Too—The Case for Equal Insurance Coverage For Serious Mental Illness*, 24 ST. MARY'S L.J. 365, 369-370 (1993) (diabetes can usually be well controlled, but not cured, by drugs). Michael A. Vaccari, J.D., *The Inability to Swallow as a Fatal Pathology: Comments on the Mchugh/O'Rourke Correspondence and the Removal of Life-sustaining Treatment*, 7 ISSUES L. & MED.

Cancer generally leads to death,[67] and is curable only when detected early.[68] Asthma, diabetes, and several cancers result from genetic defects,[69] and develop only after people come into contact with certain environmental stimuli.[70]

Furthermore, that the military has discharged individuals for other reasons is not persuasive. These personnel have been discharged precisely because they were unable to perform their duties. HIV-positive personnel can continue to perform their duties because they can be asymptomatic for years.[71]

6. Finally, Dornan claims that the military is "not responsible for disabilities unrelated to military service." Dornan alleges that his Amendment is a humane response to the situation of HIV-positive personnel, because it "graciously gives HIV-infected personnel honorable discharges and full health benefits for the rest of their lives."

155, 161 (1991) (Certain diseases are not curable but are treatable in that the progress of the disease can be controlled. In the absence of such treatment, the condition will cause death. The treatment for these illnesses ranges from the relatively simple to the very complex.... Diabetes is a condition that, if untreated, can lead to a diabetic coma, chronic kidney failure, and atherosclerosis (and its attendant risks of stroke, heart attack, and high blood pressure). The treatment for diabetes is a daily dosage of insulin if the condition is insulin dependent or, if the condition is noninsulin dependent, a diet or an oral agent).

[67]2 THE OXFORD ENGLISH DICTIONARY 823 (2nd ed. 1989).

[68]*See* Lee Ann Flyerm, *Will Financially Sound Corporate Debtors Succeed in Using Chapter 11 of the Bankruptcy Act as a Shield Against Massive Tort Liability?*, 56 TEMP. L.Q. 539, 567 (1983) (another disease caused by the inhalation of asbestos is mesothelioma, a non-curable, fatal cancer of the mesothelial cells which line the chest wall and surround the organs of the chest cavity).

[69]Michael J. Malinowski, *A False Start? The Impact of Federal Policy on the Genotechnology Industry*, 13 YALE J. ON REG. 163, 173 (1996).

[70]Lori B. Andrews, *Torts and the Double Helix: Malpractice Liability for Failure to Warn of Genetic Risks*, 29 HOUS. L. REV. 149, 161 (1992).

[71]It is not known what percentage of persons infected with HIV will eventually develop AIDS, or how long it takes for symptoms to develop. Garry G. Mathiason & Steven B. Berlin, *AIDS in the Healthcare, Business, and Governmental Workplace*, C902 ALI-ABA 731, 736 (1994). *See also* Robert D. Zaslow, Comment, *Child Custody, Visitation, and the HIV Virus: Revisiting the Best Interests Doctrine to Ensure Impartial Parental Rights Determinations for HIV-Infected Parents*, 3 J. PHARMACY & L. 61 (1994).

But automatic discharge does not help the spouses, children and other members of the service members' families who depend on their salaries and benefits. As Senator Boxer observed,

> Military personnel discharged under the new policy will lose their jobs even if they exhibit no signs of illness. They will lose their right to disability benefits and their spouses and children will lose their health care coverage. This policy is worse than wrong, it is un-American.[72]

The policy will leave many service members without employment for themselves and health care for their families. A discharged service member will be excluded from any DOD health care. He or she will be discharged from service, lose employment, retirement potential, and lose the family's medical care.[73]

7. There are other policy arguments that may be used against the Dornan Amendment. Mandatory separation can actually lead to a waste of resources. The chairman of the Joint Chiefs of Staff, General John Shalikashvili said the provision is wasteful because it requires the military to discharge people "in whom we have invested some training, and they have considerable experience and so they continue to contribute."[74] The policy would squander, not only the amount of money and resources that have been expended in the training of these individuals, but also the invaluable experience that they have gained as members of the military.

The Amendment will also force the military to shut down some of the nation's most important research efforts on AIDS. The Defense Department has been conducting research on HIV since it was first detected in service members in the early 1980s, and the military maintains one of the world's largest and most complete records on the spread of the virus. Much of the active research will end of the HIV-positive members are discharged. The extent of the research that has been done by the military reflects its unique ability to force all of its

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[72]Boxer, *supra* note 62.

[73]142 Cong. Rec. S2285-02, *S2293-*S2294 (Statement of Sen. Nunn).

[74]Military Discharges Over HIV "Unfair", 3/6/96 Charleston Gazette & Daily Mail, 1996 WL 5177731.

uniformed employees to be screened regularly for the virus, allowing the disease to be tracked down in thousands of patients from the earliest stages of infection to death.[75]

VI. THE EQUAL PROTECTION ARGUMENT

At first glance, the Dornan Amendment implicates discrimination against HIV-positive military personnel. Generally, the Federal government seeks to prevent discrimination against people who suffer disabilities, and has enacted statutes to prevent such discrimination. Unfortunately, these federal statutory remedies have been found by courts to be inapplicable to military personnel. Neither the Vocational Rehabilitation Act[76] (VRA) nor the ADA[77] covers the military profession.[78] In *Doe v. Ball*,[79] for example, a naval reserve member who was released from active duty after testing positive for HTLV-III antibody brought an action against the Secretary of the Navy and Commanding Officer of Naval Air Reserve, alleging that his dismissal violated the VRA and the due process clause of the Fifth Amendment. The District Court held that Doe had no remedy under the Rehabilitation Act citing decisions of the Courts of Appeals, which concluded that the definition of military departments, as used in Title

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[75]The military was among the first to detect the spread of the virus among heterosexuals. *Discharging soldiers to hinder AIDS research*, 3/3/96 Austin Am.-Statesman A11, 1996 WL 3420450.

[76]29 U.S.C.A. § 701 *et seq.*

[77]42 U.S.C.A. § 12101, *et seq.*

[78]For the VRA, *see* Martinez v. Hillsborough County School Board, 861 F.2d 1502, 1506 (11th Cir. (M.D.Fla., Aug. 8, 1988). *See also* Robert A. Kushen, *Asymptomatic Infection With the AIDS Virus as a Handicap Under the Rehabilitation Act of 1973*, 88 COLUM. L. REV. 563 (1988). For the ADA, *see* Eckles v. Consolidated Rail Corp., 890 F. Supp. 1391 (D.Ind., Jul. 5, 1995) (No. IP 93-0684-C H/G) and Smith v. Dovenmuehle Mortgage, Inc., 859 F.Supp. 1138, (N.D.Ill., Jun. 10, 1994) (No. 94 C 139) and U.S. v. Morvant, 898 F.Supp. 1157 (1995).

[79]725 F.Supp. 1210 (M.D.Fla., May 4, 1989).

VII (of the Civil Rights Act of 1964)[80] does not include uniformed military personnel.[81] The Eleventh Circuit Court of Appeals affirmed.[82]

In *Coffman v. State of Michigan*,[83] a major in the Active Guard Reserve was discharged in 1993 for his failure to run two miles in the required time. He sued claiming violations of the ADA, the VRA, the Michigan Handicapper's Civil Rights Act, and the Due Process Clause of the Fourteenth Amendment.[84] The Court found the federal claim to be barred by *res judicata* because the plaintiff made the same allegations of discrimination against the same parties in state court, which had already held that the military need not comply with handicap discrimination laws.[85] It went on to say that, even if it was not so barred, plaintiff's request for a reasonable accommodation "would nevertheless require an impermissible encroachment on the Army's

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[80]The prohibitions under the Rehabilitation Act are enforceable through the "remedies, procedures, and rights" found in section 7171 of the Civil Rights Act of 1964.

[81]*Id.*, at 1213, *citing* Roper v. Dept. of Army, 832 F.2d 247 (2nd Cir. (N.Y.), Nov. 2, 1987); Gonzalez v. Dept. of Army, 718 F.2d 926 (9th Cir. 1978); Johnson v. Alexander, 572 F.2d 1219 (8th Cir. (Mo.), Feb. 17, 1978). The Court pointed out that when Title VII was enacted, Congress meant to distinguish between civilian employment in a "military department" and uniformed military personnel in the armed forces. *Id.*, at 1214. The Court also held that it was barred from reviewing the constitutional issues under military personnel policies under Mindes v. Seaman, 453 F.2d 197 (5th Cir.(Fla.), Dec. 22, 1971).

[82]Doe v. Garrett, 903 F.2d 1455 ((Fla.), June 25, 1990). It explained that the Navy's refusal to reenlist Doe in the NRCR program does not impinge on any constitutionally-protected property interest because it was well-established that a military officer's expectation of continued military employment does not rise to the level of a property interest unless it is rooted in some statute, regulation, or contract. *Citing* Sims v. Fox, 505 F.2d 857 (5th Cir.(Ga.), Apr. 19, 1974). *Id.* at 1462. Neither did Doe have a protected liberty interest because case law recognizes this interest only where there has been a discharge of termination of a government employee on the basis of false and stigmatizing reasons publicized by the government employer. To implicate the liberty interest, the employer must assert a false basis for the decision it makes. In this case, there was no such falsity. *Id.*, at 1462-1463.

[83]914 F.Supp. 172 (D.Mich., Oct. 26, 1995).

[84]*Id.*, at 173.

[85]Plaintiff previously filed suit in the Michigan Court of Claims (initially filed in Circuit Court) for handicapper discrimination relating to his termination.

authority by the Court, especially as it relates to personnel decisions."[86] The remedy for the allegation of due process rights, said the Court, was through the administrative review procedure of the military.[87]

These decisions notwithstanding, the Dornan Amendment can still be challenged as a violation of the Equal Protection Clause of the Fourteenth Amendment.[88] The Supreme Court, after all, has long recognized the constitutional infirmity of penalizing status alone.[89] Neither *Doe* nor *Coffman*, dealt adequately with this issue.

There are three ways that this challenge can be made. The first way is to ask whether there is discrimination between those who are known to be HIV-positive and those who are not. Although this approach has

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[86]*Id.*, at 175. The Court cited Chappell v. Wallace, 462 U.S. 296, 300-301 (1983), thus:

> [c]ivilian courts must, at the very least, hesitate long before entertaining a suit which asks the court to tamper with established relationship between enlisted military personnel and their superior officers; that relationship is at the heart of the unique structure of the military establishment. . . 'Orderly government requires that the judiciary be as scrupulous not to interfere with legitimate Army matters as the Army might be scrupulous not to intervene in judicial matters.

[87]*Id.*, at 176. Although the plaintiff did file suit before the Army Board of Correction of Military Records, he did not appeal its decision.

[88]U.S. CONST. amend. XIV. This is made binding on the federal government by the Due Process Clause of the Fifth Amendment. *See* Boling v. Sharpe, 347 U.S. 497 (1954). The Equal Protection Clause of the Fourteenth Amendment commands that no State shall "deny to any person within its jurisdiction the equal protection of the laws," which is essentially a direction that all persons similarly situated should be treated alike." *See* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 439 (1985). The due process clause of the Fifth Amendment has an equal protection component that applies to the federal government. Boling v. Sharpe, 347 U.S. 497 (1954), *cited* in Watson v. Perry, No. C95-1141Z, 1996 WL 115473, at *7 (W.D. Wash. March 7, 1996) Fifth Amendment equal protection claims are treated precisely the same as equal protection claims under the Fourteenth Amendment. Weinberger v. Wiesenfield, 420 U.S. 636 (1975).

[89]*See* U.S. v. Brigoni-Ponce, 422 U.S. 873, 885-887 (1975), Robinson v. California, 370 U.S. 660, 665-667 (1962), Powell v. Texas, 392 U.S. 514, 532-534 (1968).

proven effective in other contexts,[90] it is irrelevant in the military setting because everyone is tested for the virus regularly, and the military knows exactly who is, and who is not infected with the virus. The second way is to ask if there is discrimination between those who are HIV-positive and those who are not. But courts have upheld regulations, especially in the military, which provide for the disparate treatment of people infected with HIV.[91] The third way that equal protection can be raised would be to ask if there is discrimination between those who are HIV-positive, and those who suffer from other forms of disabilities. I argue that it is in this way that the Dornan Amendment becomes constitutionally infirm.

Supporters of the Dornan Amendment might claim that mandatory separation is a military matter and courts should, therefore, defer to the decision of the military or Congress. Indeed, there is an established rule in constitutional law that accords significant deference to the "considered professional judgment" of military officials regarding the composition of the armed forces.[92] Regulations that might infringe

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[90]*See* District 27 Community School Board v. The Board of Education of the City of New York, 130 Misc.2d 398, 502 N.Y.S.2d 325 (N.Y.Sup., Feb. 11, 1986). In this case, petitioners sought an injunction to bar the admission of children diagnosed with AIDS from any public school in New York City. The Court denied the request on the ground that it would adversely affect those who were known to be infected with the virus and not those who were not. The Court held that,

> Absent any rational basis for petitioner's proposed exclusion of only known AIDS cases or carriers of the virus, without imposing such exclusion in the case of ARC patients or asymptomatic carriers who are as likely to present a risk of contagion because they to are infected with HTLV-III/LAV, such a proposal must be deemed a denial of the equal protection of the laws.

Id., at 416.

[91]*See* Doe v. Marsh, No. 89-1383-06, 1990 U.S. Dist. LEXIS 1442 (D.D.C. Feb. 8, 1990).

[92]Goldman v. Weinberger, 475 U.S. 503, 508 (1986). As the Supreme Court explained,

> [I]t is difficult to conceive of an area of governmental activity in which the courts have less competence. The complex, subtle, and professional decisions as to the composition, training, equipping, and control of a military force are essentially professional military judgments, subject always to civilian control of the Legislative and Executive Branches.

constitutional rights in other contexts can be upheld "because of military necessities."[93] The military is often referred to as a specialized society separate from civilian society.[94] Furthermore, this rule, cautioning civilian courts from interfering with military personnel decisions and policies,[95] is implicated by the Dornan Amendment even if what is involved is not an internal military regulation, but a Congressional mandate that is offensive to the Constitution. The Supreme Court has held that "Congress is permitted to legislate both with greater breadth and with greater flexibility when prescribing the rules by which [military society] shall be governed."[96]

But while this may be true, it has to be stressed that there is no "military exception" to the Constitution[97] and the deference to the military does not make the military immune to an equal protection challenge. Indeed, the military's classification of homosexuals has been found to implicate equal protection issues,[98] and to be discriminatory.[99]

See Gilligan v. Morgan, 413 U.S. 1, 10, 93 S.Ct. 2440, 2446, 37 L.Ed.2d 407 (1973).

[93]Beller v. Middendorf, 632 F.2d 788, 810 (9th Cir. (Cal.), 1980).

[94]Parker v. Levy, 417 U.S. 733, 743 (1974).

[95]*See* Chappell v. Wallace, 462 U.S. 296 (1983).

[96]Parker v. Lewis, 417 U.S. 733 (1974). In Rostker v. Goldberg, 453 U.S. 57 (1981), the Supreme Court held that the Military Selective Service Act did not violate the due process clause of the Fifth Amendment. The Court explained that,

> Men and women, because of the combat restrictions on women, are simply not similarly situated for purposes of a draft or registration for a draft ... The fact that congress and the Executive have decided that women should not serve in combat fully justifies Congress in not authorizing their registration, since the purpose of registration is to develop a pool of potential combat troops.

Id., at 78-79.

[97]Steffan v. Aspin, 8 F.3d 57, 303 U.S. App. D.C. 404 (D.C.Cir., Jan. 7, 1994); Saum v. Widnall, 912 F. Supp. 1384, 1392 (D.Colo., Jan. 29, 1996).

[98]Meinhold v. United States Department of Defense, 34 F.3d 1469 (9th Cir. (Cal.). Aug. 31, 1994) (Although courts defer to the military's judgment about homosexual conduct, and classifications having to do with homosexuality may survive challenge if there is any rational basis for them, at least a serious question is raised whether it can ever be rational to presume that one class of persons ... will violate regulations whereas another class will not).

[99]*See* Holmes v. California Army National Guard, 1996 WL 156527 (N.D.Cal. Mar. 29, 1996) (No. C 95-688-SBA). The court found that the governmental interests asserted by the government stem from the fear and discomfort of some service

Even within the military, prejudice, whether founded on unsubstantiated fears, cultural myths, stereotypes, or erroneous assumptions, cannot be the basis for a discriminatory classification.[100]

A. The Standard of Review

The question that should be asked is what standard should be used when assessing the constitutionality of Dornan amendment. Early cases

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members, which results from their knowledge that homosexuals are present in the military. Said the court,

> While it may be true that some intolerant heterosexual service members are uneasy in the presence of homosexuals, the court rejects the notion that the bigotry of those service members provides a constitutionally sufficient basis to banish an entire class of persons from the military... The military's true interest is in suppressing expressions of homosexual identity as opposed to protecting heterosexual service members' privacy or preventing sexual tension.

Id., at 20. It went on to say that:

> ...[t]here can be no legitimate, rational basis for a policy which forces citizens to lie and conceal their identity, simply to accommodate and submit to the bigotry of others. While the Court acknowledges that the promotion of an effective military is a legitimate governmental interest, the Court finds that the new policy does not further that interest—and, in fact, severely detracts from it.

Id., at 21. There has been disagreement within the courts, however, as to the constitutionality of the "Don't Ask, Don't Tell" Policy. *See* Alan N. Yount, *Don't Ask, Don't Tell: The Same Old Policy in a New Uniform*, 12 J. CONTEMP. HEALTH L. & POL'Y 215 (1995).

[100]Cammermeyer v. Aspin, 850 F.Supp. 910, 915 (W.D. Wash., Jun. 1, 1994). In Pruitt v. Chaeney, 963 F.2d 1160 (9th Cir. (Cal.), Aug. 17, 1991), the court said that simply labeling the government's decision as "military" does not prevent a meaningful review of the decision to discharge the plaintiff because she is a homosexual. This case has been appealed to the 9th Circuit. *See also* Dahl v. Secretary of the United States Navy, 830 F.Supp. 1319 (E.D.Cal., Aug. 30, 1993), and Able v. United States, 880 F.Supp. 968 (D.N.Y., Mar. 30, 1995) (even if defendants do believe that heterosexual service members will be so upset by a coworker's mere statement of homosexuality as not to work cooperatively in the unit, such a belief does not justify a discriminatory policy... Congress may not enact discriminatory legislation because it desires to insulate heterosexual service members from statements that might excite their prejudices). *Id.* at 980. This is case is on appeal with the Second Circuit.

considered public health regulation under the minimum security standard applied to economic regulation and civil rights infringements. The standard presumes legislation to be valid unless it bears no reasonable relationship to the achievement of a proper governmental objective. Courts rarely found regulations enacted to protect public health to be unreasonable, arbitrary or oppressive.[101] Legislation involving social or economic matters is presumed valid as long as "the classification drawn by the statute is rationally related to a legitimate state interest."[102] The deference inherent in rational basis review "is true to the principle that the Fourteenth Amendment gives the federal courts no power to impose upon the States views of what constitutes wise economic policy or social policy.[103] The discriminatory classification is allowed as long as it is based upon a reasonable distinction rationally related to a legitimate governmental interest.[104]

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[101]Note, *The Constitutional Rights of AIDS Carriers*, 99 HARV. L. REV. 1274, 1276-1277 (1986).

[102]City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432 (1985).

[103]Dandridge v. Williams, 397 U.S. 471 (1970), *cited in* Sean C. Doyle, *HIV-Positive, Equal Protection Negative*, 81 GEO. L. J. 375, 380 (1992).

[104]Doyle, *id.*, *citing* Allied Stores of Ohio v. Bowers, 358 U.S. 522, 528 (1959). When the classification is based on race, alienage, national origin, or sex, the standard shift to one of "strict scrutiny." These categories are deemed "suspect classes" because they are generally devised for reasons grounded in prejudice or antipathy, and entail traits, which are usually irrelevant to any state interest. Doyle, *id.*, at 382, *citing* City of Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985). Courts have devised a three-part test to determine whether to apply strict scrutiny, to wit: 1) whether the members of the class have been subjected to a history of discrimination, 2) whether the members of the class possess an immutable characteristic defining them as such, and 3) whether the class is essentially politically powerless. *Id.*, *citing* High Tech Gays v. Defense Indus. Sec. Clearance Office, 895 F. 2d 563, 573-74 (9th Cir. 1990) (holding that homosexuals are not a suspect class because homosexuality is not immutable and homosexuals are not politically powerless). Persons suffering from AIDS are not members of an inherently suspect class for purposes of equal protection analysis. Harris v. Thigpen, 727 F.Supp. 1564, 1570 (M.D.Ala. 1990); judgment aff'd in part, vacated in part on other grounds, 941 F.2d 1495 (11th Cir. 1991).

The third level of analysis, intermediate scrutiny, is triggered by classifications that usually bear no sensible relation to a class member's ability to contribute to society, including classifications based on gender and illegitimacy. To pass this level of scrutiny, the government must show that the classification bears a "substantial" relationship to an "important" governmental interest. Doyle, *id.* at 382, *citing*, Mississippi University for Women v. Hogan, 458 U.S. 718, 724 (1982).

We consider two cases that demonstrate judicial deference to military judgment. In *Doe v. Rice*,[105] a member of the Puerto Rico Air National Guard was discharged after testing positive for HIV, and he brought a civil rights action alleging unlawful discrimination on the basis of a handicap. The District Court of the District of Puerto Rico dismissed the action saying that there was no violation of the plaintiff's Fifth and Fourteenth Amendment rights, and that the policy in question[106] complied with the policy statements of the Department of Defense and Department of the Air Force at the time of the transfer. The Court held that the plaintiff was not retired due to a physical disability. "Rather, it is the *sui generis* situation of an administrative discharge based upon medical considerations which makes Doe unsuitable to continue in a deployable military position."[107]

The First Circuit Court of Appeals vacated the judgment with respect to back pay, but affirmed the decision on the merits in all other respects.[108] It should be pointed out that the Court declined to review the equal protection claim because the plaintiff did not alleged it in his complaint, and was deemed waived "because plaintiff had not argued it on appeal in more than a perfunctory manner."[109] This case challenged the military's policy on the deployment of HIV-positive personnel, and not mandatory separation.

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[105]800 F. Supp. 1041 (D.P.R., Aug. 31, 1992).

[106]The policy mandated those who test positive for the HIV virus, and who are not on active duty, and are not entitled to military health care be transferred to Stan-by Reserves if they cannot be used in nondeployable position.

[107]*Id.*, at 1048.

[108]Charles v. Rice, 28 F.3d 1312, 1315 (1994).

[109]*Id.*, at 1319, *citing* Gamma Audio & Video, Inc. v. Ean-Chea, 11 F.3d 1106, 1113 (1st Cir. (Mass.), Dec. 22, 1993). The plaintiff argued that the policy drew an invalid distinction between reservists and active duty personnel by permitting the former to be discharged solely because of their HIV status, while guaranteeing to the latter, the right not to be discharged on the basis on the basis of the infection alone. Even if the issue was timely raised, the court held that claim was groundless because the regulations under scrutiny did not mandate that reservists be separated solely on the basis of HIV infection, but that a reservist with HIV shall be transferred to the Standby reserve only if there are no nondeployable positions available.

In *Doe v. Marsh*,[110] an Army enlistee who tested HIV-positive challenged, on various statutory and constitutional grounds, the Secretary of the Army's policy that disallows soldiers who are infected with HIV from being assigned to or attending formal schooling that would result in the award of a military occupational specialty (MOS) different from the MOS he currently held. Plaintiff sought declaratory relief that would void this Army policy.[111] At the heart of the Complaint was the challenge to the policy of not prohibiting HIV positive soldiers to change their MOS specialty upon reenlistment as in violation the equal protection guarantee of the fifth amendment.[112] He asserted that he was "being denied the right that would be granted to all other Army enlisted personnel on reenlistment — to learn whatever he is taught as a military enlisted man in the MOS of Engineering 64E." He claimed that he was denied "the right to a meaningful reenlistment" in violation of the equal protection clause of the fifth amendment.

In addressing the issue, the Court noted that the plaintiff did not allege that he is a member of a suspect class or that fundamental rights are involved, and that to prevail in his equal protection claim, plaintiff must show that his differential treatment on account of his HIV positive status is not rationally related to a legitimate government interest.[113]

According to the Court, the Army's policy "reflects current knowledge regarding the natural history of the disease, the risks to the infected individual incident to military service, the risk of disease transmission to the non-infected, the effect of infected personnel on unit functions and readiness, and the safety of the blood supply."[114] The

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[110]No. 89-1383-06, 1990 U.S. Dist. LEXIS 1442 (D.D.C. Feb. 8, 1990).

[111]He also challenged the Army Board for Correction of Military Records' decision not to change plaintiff's service records to indicate that he acquired the HIV infection from a blood transfusion rather than from a casual sexual encounter with a woman. He sought injunctive relief that would require the correction of his service record to show that he acquired the virus in a service connected activity. *Id.* at 1-2.

[112]*Id.*, at 6-7. He also alleged violations of (1) 10 U.S.C @ 1074; (2) the Rehabilitation Act, 29 U.S.C. @ 791; (3) Executive Orders intended to protect handicapped individuals in the federal government; and (4) the "spirit" of Title VII of the Civil Rights Act of 1964.

[113]*Id.*, at 16, *citing* Cleburne v. Cleburne Living Center, Inc., 473 U.S. 432, 440 (1985).

[114]*Id.*, *citing* AR 600-110 at para. 1-1.

regulation provides for preventative counseling for HIV positive individuals and their families,[115] and is designed to ensure a systematic evaluation and study of the natural progression of the disease.[116] In the Court's view these are rational and even salutary purposes.[117] It explained that:

> The regulation at issue strikes a balance between the personnel needs of the Army, the medical needs of HIV positive soldiers, and the safety needs of non-infected military personnel. In the Court's view, AR 600-110 is a narrowly tailored regulation that places reasonable restrictions on the duty assignments of HIV positive soldiers. Since plaintiff cannot show that the Army's policy has no rational purpose, the regulation withstands constitutional scrutiny. Defendant is entitled to judgment as a matter of law. [118]

Thus, although the challenge to the Army's policy on statutory and constitutional grounds was justiciable, the Court held that the plaintiff failed to state a claim under both federal law and the equal protection guarantee of the Fifth Amendment.[119] Indeed, there is no constitutional right to reenlist in the armed forces in the first place, let alone in a specific MOS.[120]

However, neither *Rice* nor *Marsh* dealt with the issues that are raised by the Dornan Amendment, because they did not consider the disparate treatment of HIV-positive personnel as against other non-deployable personnel.

B. Rational Basis

Rational basis review is a two-step process. A court must first determine whether the challenged classification serves a legitimate governmental purpose. If the court finds that it does, it must then ask whether the discriminatory classification is rationally related to the

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[115]Id., at para. 2-16.

[116]*Id.*, at para. 2-18.

[117]*Id.*, at 17.

[118]*Id.*, at 18.

[119]*Id.*, at 19.

[120]E.g., Holdiness v. Stroud, 808 F.2d 417, 424 (5th Cir.(La.), Jan. 23, 1987) (stating that plaintiff had "no constitutional right to re-enlist").

achievement of that legitimate purpose.[121] A discriminatory classification that is based on prejudice or bias is not rational as a matter of law.[122]

As to the first inquiry, it has been held that maintaining an effective armed forces is a legitimate governmental purpose.[123] But in this case, the Department of Defense claims that the amendment serves no legitimate purpose, and that is in fact arbitrary, unwarranted, and unwise.[124] This is a rare situation where the military and Congress, both bodies given deference by the judiciary, have taken opposing stands on the issue of whether there is a legitimate government purpose to a discriminatory classification. To which entity should the courts defer? In one case where there was such a disagreement, the Supreme Court sided with Congress. In *Rostker v. Goldberg*,[125] the Supreme Court deferred to a Congressional decision disallowing the registration of women under the Military Selective Service Act. This decision was made despite the President's and the military leadership's support for the registration of women.[126]

The Supreme Court in that case found deference appropriate because Congress "specifically considered the question of the Act's constitutionality."[127] The Court differentiated the case from other gender-based discrimination cases, that represented the "accidental by-product of a traditional way of thinking about families."[128] Indeed, as if

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[121]*See* Trimble v. Gordon, 430 U.S. 762, 766 (1977).

[122]*See* Palmore v. Sidoti, 466 U.S. 429, 433 (1984).

[123]Philips v. Perry, 883 F. Supp. 539 (D.Wash., Mar. 17, 1995). *See also* Watson v. Perry, 1996 U.S. Dist. LEXIS 3116, at 19 (W.D. Wash. March 7, 1996) (the government has a legitimate interest in maintaining the readiness and combat effectiveness of its military forces).

[124]Press briefing by Counsel to Pres. Jack Quinn and Asst. Attorney General Walter Dellinger, 2/12/96 M2PW (No Page), 1996 WL 7893248.

[125]Rostker v. Goldberg, 453 U.S. 57 (1981).

[126]In fact, the District Court (Goldberg v. Rostker, 509 F.Supp. 586 (E.D. Pa., July 18, 1980) found the Act constitutionally invalid relying heavily on the decisions of the President and the military leadership. Rostker v. Goldberg, 453 U.S. 57, 79 (1981).

[127]*Id.*, at 64. In rejecting the registration of women, Congress explicitly relied upon its constitutional powers under Art. I, § 8, cls. 12-14." *Id.*, at 65.

[128]*Id.*, at 74.

to emphasize the amount of Congressional consideration in this case, the Court recounted the entire history of the passage of the Act in both houses of Congress.[129] In contrast, the Dornan Amendment was passed without the benefit of Congressional inquiry into its constitutionality. No reports were considered by Congress, and no debates were held; the controversial law was smuggled into the military's budget at the committee level.[130]

An admittedly weaker argument that can be used is that there are times when Congress does defer to military judgments, at least in cases of emergencies. In the infamous case of *Hirabayashi v. U.S.*,[131] the appellant, an American citizen of Japanese ancestry was convicted of violating the Act of March 21, 1942[132] which made it a misdemeanor knowingly to disregard restrictions made applicable by a military commander to persons in a military area as authorized by an Executive Order of the President.[133] Executive Order No. 9066[134] authorized and directed the Secretary of War and the Military Commanders to prescribe military areas in such places from which any or all persons may be excluded, and where the right of any person to enter, remain in, or leave could be restricted. The Court held that Congress, in passing the Act, ratified and confirmed the Executive Order.[135] But as it has been observed, while the Court found congressional ratification of the exclusion program, it was only deferring to a congressional decision to defer to the military on the validity of the exclusion program. Congress,

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[129]*Id.*, at 72-74.

[130]It has also been said that Rostker is truly exceptional in that it carried "the principle of deference to new heights." Professor Kenneth Karst called the Court's decision "an extreme form of judicial deference—not to the judgment of the military leadership or the President... but to the judgment of Congress." Kenneth Karst, *The Pursuit of Manhood and the Desegregation of the Armed Forces*, 38 UCLA L. REV. 499, 566 (1991). Karst asserts that the decision is actually part of a series of decisions by the Rehnquist Court that "comes close to creating a 'military exception' to the Bill of Rights." *Id.*, at 565.

[131]Hirabayashi v. U.S., 320 U.S. 81 (1943).

[132]18 U.S.C.A. § 97a.

[133]Hirabayashi v. U.S., 320 U.S. 81, 83 (1943).

[134]7 Fed. Reg. 1407 (1942).

[135]Hirabayashi v. U.S., 320 U.S. 81, 91 (1943).

in fact, did not make any independent factual analysis on its own.[136] In *Korematsu v. U.S.*,[137] the exclusion policy was again upheld because of the urgency of the situation, and because Congress, "reposing its confidence in this time of war in our military leaders—as inevitably it must—determined that they should have the power to do just this."[138] The easy response to this approach is that there is no emergency here, at least, not in the same scale as a full-scale war.

But the Dornan Amendment still has to clear the second inquiry. Even assuming that the Dornan Amendment does serve a legitimate purpose, to survive constitutional scrutiny, the government must be able to show that there is a rational basis for the discharge of HIV-positive personnel, and no other non-deployable personnel.

Courts disallow preferential treatment of one group of disabled persons over another. In *New York State Association for Retarded Children, Inc., v. Carey*,[139] the District Court considered the constitutionality of the exclusion of mentally retarded pupils who happened to be carriers of hepatitis B form special education programs in public schools. The Court held that the Board of Education overreacted to the problem of hepatitis B contagion in its special education classes,[140] and that the risk of contagion among mentally retarded children "is not substantial enough to justify their discriminatory exclusion from public school."[141] The Board of Education made no plans to exclude normal children who are also hepatitis B carriers, which the Court found to be a violation of "the constitutional rights of the children to equal protection and due process of the law."[142]

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[136]Hohri v. U.S., 782 F.2d 227, 233 (1986). Although hearings were held before the Select Committee Investigating National Defense Mitigation, none of the witnesses were members of the intelligence community. Moreover, the Committee expressly declared that it based its endorsement of the evacuation program on the need to defer to the judgment of the military authorities, not on its own analysis of the facts.

[137]323 U.S. 214 (1945).

[138]*Id.*, at 223.

[139]466 F.Supp. 479 (E.D.N.Y., Sep. 14, 1978). The case was affirmed by the Second Circuit in 612 F.2d 644 (2nd Cir. (N.Y.), Dec. 10, 1979).

[140]*Id.*, at 485.

[141]*Id.*, at 486.

[142]*Id.*, at 486.

This case can be used to support a challenge to the Dornan Amendment because it disallowed the dissimilar treatment of normal and mentally retarded children even when they were suffering from the same disease. Mandatory separation under the Dornan Amendment, it may be argued, likewise provides for the dissimilar treatment of HIV-positive personnel, even when there are thousands of other service members who are similarly nondeployable.

Another helpful case is *Hines v. Sheehan*,[143] a class action suit that challenged a state Medicaid regulation that restricts Medicaid reimbursement for liquid dietary supplements. Maine's Medicaid program covered outpatient prescription drugs and certain over-the-counter drugs. However, it placed certain restrictions, to wit, reimbursement would be made (1) if the patient can only receive the supplement through a feeding tube or (2) whether or not the patient needs a feeding tube, if the patient has end stage renal disease with clinical evidence of malnutrition. Patients who have other diseases with clinical evidence of malnutrition but do not use a feeding tube were ineligible for coverage.[144]

The plaintiff, Raymond Hines, a person with AIDS, filed a class suit in behalf of people who do not need to use a feeding tube but for whom physicians have prescribed the use of liquid dietary supplements because of AIDS-related malnutrition. The Court found no rational basis for Maine's restrictions. Indeed, the state did not make an effort to explain its restrictions. According to the Court,

> Inexplicably, the state has stipulated on the record that there is nothing in the history of its Medicaid rule to explain why end stage renal disease was chosen to qualify for liquid dietary supplements or why other diseases with associated malnutrition do not qualify. What is more troubling, in its legal memorandum defending the program, the state Attorney General's office has not bothered even to articulate a plausible reason that would justify the choice of end stage renal disease over all others. Instead, the stipulate record includes the affidavits of two doctors provided by the plaintiffs,

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[143]Hines v. Sheehan, No. 94-326-P-H, 1995 WL 463685 (D.Me., July 26, 1995).
[144]*Id.*, at 1.

> who state clearly that the choice of end stage renal disease above all others makes no sense and is irrational.[145]

While Dornan claims that the case of HIV-positive military personnel is unique and justifies specific treatment under the law, he failed to demonstrate this. Under an equal protection analysis, Dornan has to show that there is a rational basis for the discriminatory treatment of HIV-positive military personnel, as against all other members of the military service suffering from other disabilities. As discussed below, Dornan's attempts to distinguish the case of HIV-positive military personnel easily fail to show such a basis.

1. Dornan argued that the case of HIV-positive personnel is different their inability to donate blood makes them "unhealthy" under law. However, there are others in the military who are likewise unable to donate blood, but are not infected with HIV. These people are also "unhealthy" under the ADA and yet Dornan makes no attempt to explain why they are spared from the effects of his Amendment.

2. Dornan also asserted that HIV-positive military personnel are infected because of violations of the Code of Military Conduct, which warrants their separation. The obvious disregard for due process protections aside, this position can only be justified only if all those who have violated the Code are subject to mandatory separation.[146] They may be more people who have violated the Code, but are not subject to mandatory dismissal.

3. His claim that the presence of HIV-positive personnel hampers military preparedness also fails because of the fact that a mere 20 percent of all non-deployable personnel in the military are HIV-positive. Dornan makes no attempt to distinguish between those who are non-deployable because of asthma, diabetes, or cancer, and those who are HIV-positive. As earlier discussed, there is no difference among those

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[145] *Id.*, at 3.

[146] As things stand, this would be impossible to accomplish because Dornan disregards procedural due process, and would rather conclude that seropositivity is conclusive of guilt.

afflicted with any one of these diseases. All these diseases are incurable, and all can lead to death.

VII. CONCLUSION

From both policy and legal perspectives, the Dornan Amendment is clearly unjustifiable, and it will do nothing to aid the military in its mission to protect the country in times of war. This Article demonstrated that there is no rational basis in targeting and removing HIV-positive personnel from military service, and as such, the Amendment violates the Equal Protection Clause of the Constitution. The absence of any valid reason for mandatory separation, suggests that the Amendment has little to do with ensuring military preparedness.

The House of Representatives should seriously consider repealing this provision. It accomplishes nothing but a return to the beginnings of the AIDS epidemic, when most people stigmatized all infected individuals as social deviants unworthy of belonging to the rest of society. If nothing else, it reminds us that there are still those who refuse to believe that nothing short of banishment should be meted out to all those who are infected with the disease.

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